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Court of the United States.

OCTOBER TERM, 1906.

No. 732.

No. 733.

Brief for Plaintiffs in Error and Appellants upon the Questions Reserved for Re-Argument.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FREDERICK W. LINCOLN ET AL, Plaintiffs in Error. AGAINST UNITED STATES, Defendant in Error.	No. 149.
WARNER, BARNES & COMPANY, LIMITED, Appellant, AGAINST UNITED STATES, Appellee.	No. 466.

BRIEF FOR PLAINTIFFS IN ERROR AND APPELLANT UPON THE QUESTION RESERVED FOR RE-ARGUMENT.

On November 13th, 1905, the Court made the following order in these cases:

> "Petition for a re-hearing granted as to the question whether Congress ratified the collection of the sums sought to be recovered in these suits and the cases assigned for argument on that point on January 2nd, 1905, after the cases already assigned for that day."

We have already submitted a brief upon these questions, but as the Court has ordered a re-argument and as we have now before us the briefs filed by the Attorney-General and Solicitor-General upon the petition for re-hearing stating the positions which they severally take, we think that it will promote the convenience of the Court as well as of counsel, although at the risk of some repetition, to file a new brief covering what we have already said and what we purpose to say on the re-argument.

The questions as stated by the Court in the order of May 29, 1905, granting leave to file the petition for rehearing were

> " whether Congress ratified the collection of the sums
> " sought to be recovered in these suits, and whether it
> " had power to do so."

We take it, however, that the Court did not mean to intimate by the change in the language of the later order that it had decided the question of power in favor of the Government. This question was presented to and considered by the Court upon the main argument and decided in our favor upon the authority of *De Lima vs. Bidwell* (197 U. S., 429 ; 182 U. S., 199), and we cannot assume that the Court has altered its decision and overruled the De Lima case upon this important point without having written a new opinion.

The difference in the terms of the two orders is therefore, as we understand it, a mere matter of phraseology. Though the first order specified the question as to the power of Congress it did so merely for the sake of greater clearness. The question whether Congress had the power to ratify is necessarily involved in the question whether Congress ratified ; for if it lacked the power it did not ratify, whatever may have been its intention.

For greater clearness, and in order to avoid repeating in the same words arguments already advanced, we shall treat the question submitted as one of the construction of the Act of July 1st, 1902 ; that is, of the meaning and application of the language used and of the intention of Congress ; adverting first to the constitutional objections to construing the act as a ratification of actions of the President which this Court has held to be beyond his power, then demonstrating that the express language used does not admit of the construction

advocated in behalf of the Government, nor does the legislative intent call for that construction, and, finally, pointing out what Congress intended to, and what this act does in fact, ratify.

We preface our points by saying that with respect to all questions other than the one reserved for re-argument, the opinion of the Court reported in 197 U. S., 419, and the opinion in the first Dooley case (182 U. S., 222), now by the opinion in this case reaffirmed upon all points, state the law of this case, and we shall base our argument largely on those propositions on which, as we understand it, the decision of the Court is finally and conclusively settled.

POINTS.

FIRST.

IF THE PROPER CONSTRUCTION OF THE ACT OF JULY 1ST, 1902, WERE THAT IT RATIFIED AND LEGALIZED THE IMPOSITION AND COLLECTION OF THE DUTIES INVOLVED IN THESE SUITS, THEN THE ACT WOULD PRO TANTO, BE UNCONSTITUTIONAL AND VOID.

1. *Under this construction the act would deprive claimants of their property without due process of law and appropriate it to the public use without compensation in violation of the Fifth Amendment.*

2. *Under this construction the act would also deprive claimants of their right of action without due process of law in violation of the Fifth Amendment.*

3. *Under this construction the act is open to the further objection that it amounts to a delegation of legislative power to the executive, in violation of the first and eighth sections of the First Article and of the second paragraph of the third section of the Fourth Article of the Constitution.*

4. *Under this construction the act, if valid, would necessitate the establishment of a new principle of law, that Congress has the power to ratify an unconstitutional act of the President.*

SECOND.

THE PROPER CONSTRUCTION OF THE ACT OF JULY 1ST, 1902, IS THAT IT DOES NOT PURPORT TO AND DOES NOT RATIFY THE COLLECTION OF THE DUTIES INVOLVED IN THESE SUITS.

I. *The language used has not the legal effect of ratifying the collection of these duties.*

1. *The collection of these duties by the authorities of the government of the Philippine Islands was not "action taken in accordance with the provisions of the order of July 12, 1898, and the subsequent amendments of said order."*

2. *The action of the President taken by virtue of the authority vested in him as commander-in-chief as set forth in his order of July 12th, 1898, which the act purports to ratify does not include the collection of these duties.*

II. *Congress cannot have intended to ratify the collection of the duties involved in these cases.*

1. *The Court will not impute to Congress the intention to deprive citizens of rights to which this Court had, at the time of the passage of the act, held that other citizens under like circumstances were entitled.*

2. *The ratification of the collection of these duties would be entirely inconsistent with the general policy of the legislation by Congress since the decisions in the first Insular Cases refunding all the duties which, as this Court decided, had been illegally exacted.*

3. *It is always to be presumed that Congress does not intend to violate any of the provisions of the Constitution, or to repudiate the obligations of the government.*

THIRD.

WHAT THE ACT OF JULY 1ST, 1902, WAS INTENDED TO RATIFY IS THE ACTION TAKEN BY THE PRESIDENT IN LEVYING AND COLLECTING DUTIES BY VIRTUE OF HIS AUTHORITY AS COMMANDER-IN-CHIEF AND THE ACTIONS OF THE AUTHORITIES OF THE PHILIPPINE GOVERNMENT TAKEN IN ACCORDANCE WITH THE PROVISIONS OF THE ORDER OF JULY 12, 1898, AND ITS AMENDMENTS—NAMELY, THE IMPOSITION AND COLLECTION OF DUTIES UPON IMPORTS FROM FOREIGN COUNTRIES INTO THE PHILIPPINES FROM THE TIME THE ORDER TOOK EFFECT, NOVEMBER 10TH, 1898, TO NOVEMBER 15TH, 1901, INCLUDING IMPORTS FROM THE UNITED STATES UNTIL APRIL 11TH, 1899.

I. *The legality of the collection of duties upon imports from foreign countries by order of the President, prior to legislation by Congress, in either the Philippines or Porto Rico has never been decided by this Court, and was therefore a question of some doubt.*

II. *Congress in ratifying (if it did ratify) the action taken by the President as to the legality of which there might be doubt, but which was probably within the scope of his constitutional power, followed its own precedents of a hundred years, but did not embark on a new course of legislation by attempting to ratify actions beyond the scope of the President's constitutional power as judicially defined.*

ARGUMENT.

Taking up these points in the order stated:

FIRST.

IF THE PROPER CONSTRUCTION OF THE ACT OF JULY 1ST, 1902, WERE THAT IT RATIFIED AND LEGALIZED THE IMPOSITION AND COLLECTION OF THE DUTIES INVOLVED IN THESE SUITS, THEN THE ACT WOULD PRO TANTO BE UNCONSTITUTIONAL AND VOID.

1. *Under this construction the act would deprive claimants of their property without due process of law and appropriate their property to the public use without just compensation in violation of the Fifth Amendment.*

(a) The subject matter with respect to which these moneys were exacted, and upon which this act would, by ratification, retrospectively authorize the imposition of a tax, is the exercise of the privilege of doing a certain act—to wit, landing in Manila goods brought from New York.

The act refers to the "action of the President, whereby a tariff of duties and taxes was to be levied and collected."

Customs duties are indirect taxes; that is to say, they are not levied upon the merchandise imported, but upon the *exercise of the privilege accorded by the sovereign of importing and landing foreign merchandise* within the territorial limits of the nation.

There can be no sound contention that the moneys sought to be recovered were exacted in payment of any direct or property tax. They were clearly levied and collected as customs duties, and the act refers specifically to a *tariff* of duties.

(b) It is the law of this case that, at the time of this exaction, claimants had the right to enjoy this privilege without the payment of any tax.

In the opinion in this case, 197 U. S., 428, the Court says:

> "Apart from the question of the duration of the "President's order, it plainly was an order intended to "deal with imports from foreign countries only and "Philippine ports not in the actual military control of "the United States."

In the first Dooley case, now reaffirmed in every particular by the opinion at bar, the Court says, 182 U. S., p. 235 :

> " The proper construction of that order is, that it
> " ceased to apply to goods imported from the United
> " States from the moment the United States ceased to
> " be a foreign country with respect to Porto Rico,
> " and that until Congress otherwise constitutionally
> " directed, *such merchandise was entitled to free entry.*"

And at page 236 (182 U. S.) :

> " In our opinion, the authority of the President as
> " Commander-in-Chief to exact duties upon imports
> " from the United States ceased with the ratification of
> " the treaty of peace, and her right to the free entry
> " of goods from the ports of the United States contin-
> " ued *until Congress* should constitutionally legislate
> " upon the subject."

In the opinion in this case, 197 U. S., 429, the Court says further :

> " The fact that there was an insurrection of natives
> " not recognized as belligerents * * * just outside its
> " [Manila's] walls, did not give the President power
> " to impose duties on imports from a country no longer
> " foreign."

These quotations show clearly that it is the settled law of this case that the claimants were entitled to free entry of their goods, both because the order did not apply to them and because the President had no power to impose these duties.

(c) The provision in the Fifth Amendment, that no person shall be deprived of his property without due process of law, requires with respect to the levy and collection of taxes, that Congress must state the subject matter and fix the rate of the tax by law before taking the property of any person in payment. This is an elementary principle of constitutional law. Due process of law is not limited in scope to judicial proceedings. It prohibits every deprivation of property by the Government in whatever form, particularly the taking of property in payment of taxes for the support of the Government.

With respect to all indirect taxes upon the exercise of a

privilege due process of law requires that the taxpayer shall have notice that the tax has been lawfully imposed and the option of exercising or not exercising the privilege. If he exercises it he becomes liable to the tax. Thus he has the opportunity of knowing in advance what he will have to pay for the exercise of this privilege. Where customs duties are levied due process requires that the importer shall have a chance to be heard as to the nature and value of his goods.

This has been held in many cases.

An Act of Congress imposing duties *prospectively* which failed to provide for giving the importer a hearing before some tribunal or officer as to the value and nature of his goods on whose importation the duties were levied would violate the requirement of due process of law.

> " The importers in this case—had full notice of the
> " proceedings before the board of general appraisers
> " upon their appeal to said board, and ample opportun-
> " ity to be heard, on the question of the market value of
> " the imported goods. It cannot, therefore, be properly
> " said that they have been subjected to penalties with-
> " out notice or an opportunity to be heard, or been de-
> " prived of their property without due process of law."
> *Passavant vs. United States*, 148 U. S., 214, 222.

Obviously when a customs tax is imposed *retrospectively* there can be no option as to the exercise of the privilege of importing or as to paying the duty and no opportunity for a hearing as to the nature and value of the goods, hence no due process of law.

(d) An Act of Congress, passed in July, 1902, imposing a tax upon the importation of all merchandise brought into Manila from New York between April 11th, 1899, and November 15th, 1901, would violate this constitutional requirement.

It matters not whether in passing such an act Congress was acting under the power to levy and collect taxes, duties, imposts and excises, or under the power to make rules and regulations for the government of the territory of the United States. In the exercise of either power Congress is equally bound by the limitations contained in the Constitution and amendments.

This Court has now finally declared the law to be that in legislating under the power to rule the territories, Congress is

limited by the *prohibitions* contained in the first ten amendments, and is bound by the limitations arising from the fundamental principles upon which our system of government is based.

Downes vs. Bidwell, 182 U. S., 244, 277, 282.
Dorr vs. United States, 195 U. S., 138, 147.

For a statement of the general principles involved see
Calder vs. Bull, 3 Dall., 386.

See, also,
Fletcher vs. Peck, 6 Cr., 87, 135.
Wilkinson vs. Leland, 2 Pet., 627, 657.

(*e*) Congress has not the power to impose, under the guise of ratification, a retroactive tax which it has not power at the time it acts to impose by direct legislation.

It is argued by the counsel for the Government that the question of the power of Congress to ratify the collection of the duties in suit is sustained by the maxim that every ratification relates back and has equal force with a prior mandate; that as, under the second Dooley case, 183 U. S., 151, Congress had the power to *impose* these duties on the eleventh of April, 1899, it follows from this maxim that it had power to ratify their *collection*. This argument begs the question. Furthermore the maxim is inapplicable to an act imposing a retroactive tax. It came into use as part of the law of principal and agent, and originally meant no more than that where the principal has ratified a contract made by one who assumed to act as his agent, he is as firmly bound by the contract as if his agent had had authority to act in his behalf at the time the contract was made. The maxim has also, of late years, been applied to *remedial* acts of the Legislature confirming acts of individuals, corporations, or minor legislative or administrative bodies which might have been held invalid or irregular because of some technical defect, and where the act of ratification carries out the true intent of the parties to a transaction and works substantial justice.

The cases cited by counsel for the Government (Original Brief, pp. 25, 26; last brief on petition for rehearing, pp. 16–17), are all to the effect that the Legislature has power to

pass *remedial acts* and that such acts do not violate the requirement of due process of law.

The doctrine of these cases is summed up in the case of *Foster vs. Essex Bank*, 16 Mass., 245, quoted with approval in *Freeborn vs. Smith*, 2 Wall, 160, 175, as follows :

> " The truth is there is no such thing as a *vested right* " *to do a wrong*, and the legislature which, in its acts, " not expressly authorized by the Constitution, limits " itself to correcting mistakes and to providing " remedies for the furtherance of justice, cannot be " charged with violating its duty, or exceeding its " authority."

The Court, in the same case, goes on to say :

> " Such acts are of a remedial character, and are the " peculiar subjects of legislation. They are not liable " to the imputation of being assumptions of judicial " power."

The cases cited by counsel for the Government do not hold, nor does any case we know of hold, that where Congress has *not* power to *impose* a tax retroactively, it nevertheless *has* power to ratify *the collection* of a tax whose payment was enforced by the executive wholly without warrant of law. It cannot be that the fact that these moneys wrongfully exacted from the claimants, were in the custody of the United States at the time of the passage of the act can have any bearing upon the power of Congress to ratify their collection. The whole course of action pursued by the Philippine Government in collecting these duties, especially after the decision of this Court in the first Dooley case, shows that it was considered doubtful whether the collection of duties in the Philippines on imports from the United States was lawful and that this doubt was resolved by the authorities in favor of the Government. The theory of law upon which these suits have been prosecuted and upon which they have been decided in our favor, is that the Government has in its possession moneys which rightfully belong to claimants. To hold that the possession of these moneys by the Government gives Congress power to transfer the title from claimants to the Government is to hold that

Congress has power to confiscate the property of the citizen without either just compensation or due process of law.

It has been squarely held in *De Lima vs. Bidwell*, 182 U. S., at 199, that Congress has not this power.

The case of *Kimball vs. Town of Rosendale*, 42 Wis., 407, cited at pages 15-16 of our brief on petition for rehearing, is directly in point upon the proposition now under discussion.

In that case it appeared that the Legislature of Wisconsin in 1871 had passed an act authorizing the town of Rosendale to subscribe to the stock of a railroad company under certain conditions, one of which was that the railroad should deliver its proposition for the issue of the stock to the town clerk and should within *three months* thereafter deliver to such clerk a copy or copies of the proposition bearing the written assent of a majority of the taxpayers. The act further empowered the town to issue bonds in payment for the stock and levy taxes for the payment of the bonds. The town did subscribe the stock and issue the bonds and levy the taxes, but its action was irregular, because the railroad failed to file the written assent of the taxpayers within the three months.

Taxes were assessed for several years by the town on the plaintiff and others. The plaintiff sued to recover the amount of such taxes collected from him.

In 1877 the Legislature passed a special act declaring that the several acts of the officers of the town in subscribing for the stock, issuing its bonds and assessing, levying and collecting the taxes to pay the same had or done in good faith in attempting to comply with the statute above recited "are hereby declared legal and valid to all intents and purposes, and shall be so taken and held to be in all the courts of this state."

The question decided by the Supreme Court of Wisconsin was whether the Legislature had power to ratify the action of the town officers in view of an amendment to the State Constitution adopted in 1871, after the passage of the original act authorizing the town to subscribe to the stock, which amendment prohibited the Legislature "from enacting special or private laws in nine several cases," the sixth being "for assessment or collection of taxes, or for extending the time for collection thereof."

The Court held that this provision against the *assessment*

and collection of taxes by special act prohibited equally the *ratification by special act* of the collection of taxes irregularly assessed; that the attempted ratification was void, and that, as the officers of the town had failed to comply with the provisions of the act authorizing the subscription, plaintiff was entitled to recover the amount of his taxes.

See, also, opinion of PECKHAM, J., in *Cromwell vs. MacLean*, 123 N. Y., 474, 491–494.

In *Smith vs. Stevens*, 10 Wall., 321, the question at issue was as to the validity of a deed made by an Indian. At the time of the making of the deed an Act of Congress was in force vesting the title to certain lands in certain Indians, including this grantor, and forbidding any future disposition of them except by the Secretary of the Interior upon request of the party interested. The deed in question was made without the intervention of the Secretary. Some two years after this transaction Congress passed a joint resolution removing the restriction on alienation. It was claimed in behalf of the plaintiff-in-error that this act ratified and validated this deed. Upon this point the Court says, at page 327:

> "It is hardly necessary to say that a joint resolution
> "passed nearly two years after this transaction, remov-
> "ing the restriction on alienation, cannot relate back
> "and give validity to a conveyance, which when executed,
> "was void, nor have we any reason to suppose that
> "Congress contemplated that any such effect would be
> "claimed for its legislation on the subject."

This case is followed in *Jones vs. Meehan*, 175 U. S., 132.

2. *Under this construction this act would also deprive claimants of their right of action without due process of law in violation of the Fifth Amendment.*

In *De Lima vs. Bidwell*, 182 U. S., 1 (on pp. 199, 200), this Court held that an act of Congress claimed to effect the ratification of the exaction of duties by the Collector, Bidwell, should not be construed so as to effect the ratification; for if so construed it would deprive plaintiff of his right of action.

We submit that the De Lima decision is a controlling authority on this point.

3. *Under this construction the act is open to the further objection that it amounts to a delegation of the legislative power to the executive in violation of the first and eighth sections of the First Article and of the second paragraph of the third section of the Fourth Article of the Constitution.*

The provisions of the Constitution referred to are as follows:

> ART. I., SECTION 1. "*All* legislative Powers herein " granted shall be vested in a Congress of the United " States which shall consist of a Senate and House of " Representatives."
>
> ART. I., SECTION 8. " *The Congress* shall have Power " To lay and collect Taxes, Duties, Imposts and Ex- " cises—To regulate Commerce with foreign Nations and " among the several States.—"
>
> ART. IV., SECTION 3, second paragraph. " *The Con-* " *gress* shall have Power to dispose of and make all " needful Rules and Regulations respecting the Terri- " tory or other Property belonging to the United " States."

The grant of these owers to Congress prohibits by implication their exercise by the President. Nor can Congress delegate any part of the legislative power to the President.

> "That Congress cannot delegate legislative power " to the President is a principal universally recognized " as vital to the integrity and maintenance of the system " of government ordained by the Constitution."
>
> *Field vs. Clark*, 143 U. S., 659, 692.

If this ratification has the force of a prior mandate, it still remains true that the President in originally establishing this tariff was legislating, as is conceded by the Attorney-General (Brief of October, 1905, pp. 13, 14), where he says:

> "If his orders to that effect before the treaty took " effect were, technically, legislation, that was valid " legislation beyond question, and needed no authority " or ratification from Congress. These orders *fell*, let " us say, *as valid legislation* on April 11th, 1899, but " the President continued to do the thing prescribed " without immediate authority. *He did not legislate,* " *he did not re-establish former legislation; he simply* " *acted and continued to act.* He was simply acting " after April 11, 1899, not legislating."

Admitting, for the argument, that the President's order by its terms authorized the collection of duties on imports from the United States after the ratification of the treaty, this order is not less an act of legislation by the President with respect to such imports because it was made in July, 1898, than if it had been made on April 11th, 1899. By the treaty the United States was no longer foreign to the Philippines, and the spirit and letter of the tariff laws authorized the President to collect duties on imports from foreign countries only. Therefore, when he performed the executive act of collecting the duties from the United States he must have performed the legislative act of imposing them. If not, then the subordinates who actually collected the duties on imports from the United States were not acting in accordance with the provisions of the order. This has been our contention throughout.

If this was legislation by the President it could not be ratified by Congress because that would amount to a delegation of the legislative power. If it was not legislation, then the subordinates who collected the duties were not acting in accordance with the provisions of the order and amendments, and therefore, as we shall point out below, their action was not ratified by Congress.

4. *Under this construction this act if valid would necessitate the establishment of a new principle of law, that Congress has power to ratify an unconstitutional act of the President.*

(a) It is the law of this case that the President had not the constitutional power to levy and collect these duties.

In *imposing* these duties by the order of July 12, 1898, the President, as appears upon the face of the order, was exacting a military contribution during a war in the exercise of his constitutional powers as commander-in-chief and in *collecting* them through his military subordinates, during the war, he was acting in the same capacity. But, the war having terminated upon the ratification of the treaty, the authority of the President either to impose or collect duties *under the war power* ceased. From this time on he had no further power to *legislate* with respect to the Philippine Islands except in so far the necessities of the case required the maintenance and administration of a *de facto* civil government. Beyond this

he had no more power to legislate in the Philippines than elsewhere in the United States.

This is clearly laid down in the opinion in this case at page 429, where the Court says :

> " The fact that there was an insurrection of natives " not recognized as belligerents in another part of the " island, or even just outside its (Manila's) walls *did* " *not give the President power* to impose duties on im- " ports from a country no longer foreign (See Dooley " vs. United States, 182 U. S., 222, 234)."

His act, therefore, in collecting these duties (if it was the act of the President and not merely the unauthorized act of his subordinates) was in violation of the Constitution.

(*b*) No case upon the subject of ratification has gone so far as to hold or imply that Congress can deprive a citizen of property by ratifying an unconstitutional act of the President.

Counsel for the Government have cited several decisions of this Court upon the proposition that the ratification here was undoubtedly within the power of Congress. Out of respect for the learning and industry of the Attorney-General, the Solicitor-General and their assistants, we shall assume that in the five briefs (including the petition for rehearing) they have cited all the cases which are to be found upon the power of Congress to ratify the action of the President.

These cases are *Cross vs. Harrison*, 16 How., 164 ; *Prize Cases*, 2 Black, 635 ; *Hamilton vs. Dillin*, 21 Wall., 73 ; *Brown vs. United States*, 8 Cr., 131 ; *The Grapeshot*, 9 Wall., 129 (Brief of Atty.-Gen. of Oct., 1905, pp. 17-20 ; Brief of May, 1905, p. 21).

None of these cases holds that Congress has power to ratify an unconstitutional act of the President.

As *Hamilton vs. Dillin* is apparently relied on as the most important of these cases, we shall consider it first.

That case involved really but one question—whether Congress could authorize the President to, and the President in the exercise of the war power could, impose a license fee as a condition upon trading with the enemy. The Court held that *under the war power of the United States* both Congress and the President have the power to impose any limitations upon trade with the enemy, and that Congress can ratify an

act *which they had previously authorized* and which the President had *power to do without authorization.*

With regard to the constitutionality of the Act of July 13th, 1861, which authorized the President to regulate commercial intercourse with the insurgent states, the Court says at page 97 :

> " As before stated, the power of the government to
> " impose such conditions upon commercial intercourse
> " with *an enemy in time of war* as it sees fit is un-
> " doubted. It is a power which every other govern-
> " ment of the world claims and exercises, and which
> " belongs to the government of the United States *as*
> " *incident to the power to declare war* and to carry it on
> " to a successful termination. We regard the regula-
> " tions in question as nothing more than *the exercise of*
> " *this power.* It does not belong to the same category
> " as the power to levy and collect taxes, duties and ex-
> " cises. It belongs to the war powers of the govern-
> " ment, *just as much so as the power to levy military*
> " *contributions or to perform any other belligerent act.*"

Clearly then the doctrine of *Hamilton vs. Dillin* does not apply here. It is the law of this case that these duties were *not exacted under the war power of the President* and that the President had no power in any capacity to impose them.

In *Cross vs. Harrison*, 16 How., 164, 201, the Court held that the President had power to impose duties on imports from foreign countries and that Congress ratified this collection (9 Stat., 412; 10 Stat., 178). This is very far from being an authority for the proposition that Congress can ratify an unconstitutional act of the President.

In *Brown vs. United States*, 8 Cranch, 110, the questions involved, as clearly appears from the opinion of Chief Justice MARSHALL, pp. 121-129, were whether Congress by the declaration of war against Great Britain in the Act of June 18, 1812, had authorized the President to condemn British property found in the United States on land at the beginning of hostilities, and if not whether the President had the power to condemn without such authorization. Both questions were answered in the negative. There is no question in the case as to the power of Congress, by subsequent legislation, to legalize an unconstitutional act of the President. The reference to

this case by the learned Attorney-General is to the dissenting opinion of Justice STORY, not to the opinion of the Court.

IN *The Grapeshot*, 9 Wall., 129, it was held that the President *had power* during the civil war to establish provisional courts within the insurgent territory of Louisiana and that Congress had power upon the close of the war and the consequent dissolution of the court to enact that all judgments and decrees of the provisional court should be transferred to the Circuit Court of the United States and have the same effect as if the suits had been originally brought therein.

In the *Prize cases*, 2 Black, 635, the court decided by a majority of the Justices that the President had the power, as a war measure, to proclaim and enforce a blockade, without prior authorization by Congress, and further decided that Congress had ratified that action. The Court *did not* however, decide that if the President in so doing had *exceeded his constitutional power*, Congress by ratifying could have deprived the claimants of their right of recovery.

The four Justices who dissented (Chief Justice TANEY, Justices NELSON — who wrote the dissenting opinion — CATRON and CLIFFORD) held that the President, in proclaiming and enforcing a blockade without prior authorization by Congress, acted beyond his constitutional power and that his seizure of claimants' property amounted to confiscation, just as in the cases at bar this Court has held that the act of the military authorities in the Philippines in exacting the payments of these duties was confiscation. Upon the question of the power of Congress to ratify an unconstitutional act of the President they say (p. 697) :

> " Congress on the 6th of August, 1862, passed an
> " act confirming all acts, proclamations and orders of the
> " President after the fourth of March, 1861, respecting
> " the army and navy, and legalizing them, so far as was
> " competent for that body, and it has been suggested,
> " but scarcely argued, that this legislation on the
> " subject had the effect to bring into existence an
> " *ex post facto*, civil war with all the rights to cap-
> " ture and confiscation *jure belli* from the date referred
> " to. An *ex post facto* law is defined when after an action,
> " indifferent in itself, or lawful is committed, the Legis-
> " lature then, for the first time declares it to have
> " been a crime and inflicts punishment upon the person

" who committed it. *The principle is sought to be*
" applied in this case. *Property of the citizen or foreign*
" *subject engaged in lawful trade at the time and illegally*
" *captured, which must be taken as true, if a confirmatory*
" *act be necessary*, may be held and confiscated by sub-
" sequent legislation. In other words, trade and com-
" merce authorized at the time by acts of Congress and
" treaties, may by *ex post facto* legislation be changed
" into illicit trade and commerce with all its penalties
" and forfeitures annexed and enforced. * * * Here
" the captures were *without any constitutional authority*
" *and void; and on principle no subsequent ratification*
" *could make them valid.*"

(c) To hold that Congress has this power would be to establish a rule by which the underlying principle of the separation of the functions of the Executive and of the Legislature could be set at naught and great abuses introduced.

If Congress has the power to ratify this unconstitutional act of the President in collecting these duties, it must have the power to ratify all other unconstitutional acts and to give validity by ratification to the exercise of the legislative power by the Executive. This would in effect make the Executive the master of the Legislature, and destroy the balance of power which the Constitution was intended to preserve.

We say it would make the Executive the master of the Legislature. It is easy to furnish an example. The Executive might legislate and act to such an extent that his actions would go far beyond the possibility of recall. He might commit so enormous a wrong that Congress, although it had refused to authorize, would be compelled to ratify. If this doctrine that Congress has power to ratify an unconstitutional act of the Executive be sound, let us suppose that the President concluded that the public revenue of the United States was insufficient to meet the expenditures, and thereupon by executive order imposed a duty of five cents a pound upon all coffee imported into the United States now entitled to free entry. The collectors of customs would undoubtedly follow the order and collect the duties. Can it possibly be the law that after seven millions or any other sum had been collected as duties a future Congress would have power to ratify this action and give to such a confiscation of property the full sanction of a prior law? If so, let us suppose that

the President and a majority of the Congress entertain conflicting opinions upon the subject and that therefore no act can be passed to provide revenue. Could the President change the existing laws, increase the tariff, or the internal revenue laws, and then obtain a ratification of all his acts by a subsequent Congress of his own party? These assumed cases may seem extravagant. They are identical in principle with the present case if the Government's contention is sound.

It is now urged in this Court in behalf of the Government as a reason for dismissing the petitions of these claimants that the amount of duties collected from them and from others whose claims have been filed is very great. In other words, that this wrong is so enormous that the Court should declare that it is right.

This is an argument that one might expect to hear addressed to a group of financiers, but not to this Court. It may be "high finance"; it is not law.

SECOND.

THE PROPER CONSTRUCTION OF THE ACT OF JULY 1ST, 1902, IS, THAT IT DOES NOT PURPORT TO AND DOES NOT RATIFY THE COLLECTION OF THE DUTIES INVOLVED IN THESE SUITS.

I. *The language used has not the legal effect of ratifying the collection of these duties.*

1. *The collection of these duties by the authorities of the Government of the Philippine Islands was not "action taken in accordance with the provisions of the order of July 12th, 1898, and the subsequent amendments of said order."*

(a) It is the law of this case that this order by its terms applied to importations into the Philippine from foreign countries and Philippine ports not in the actual military control of the United States, and therefore ceased to apply to importations from the United States the moment that the United States ceased to be a foreign country with respect to the Philippines, namely, upon the ratification of the treaty.

In the opinion in this case, the Court says at page 428:

> " It plainly was an order intended to deal with im-
> " ports from foreign countries only and Philippine ports
> " not in the actual military control of the United
> " States."

and in the first Dooley case, 182 U. S., at page 235, the Court says:

> " Without questioning at all the original validity of
> " the order imposing duties on goods imported into
> " Porto Rico from foreign countries, we think the proper
> " construction of that order is, that it *ceased to apply to*
> " *goods imported from the United States* from the mo-
> " ment that the United States ceased to be a foreign
> " country with respect to Porto Rico."

(b) The amendments did not change the meaning of the order in this particular.

Before discussing this point we should call the attention of the Court to the two entirely inconsistent positions taken by the Attorney-General in his briefs of October and of May with reference to the scope and effect of the amendments.

In the brief filed May 17, 1905, the learned Attorney-General says, at page 16, after quoting the portion of the opinion in this case found in 197 U. S., at 429:

> " It is difficult to follow the reasoning of the learned
> " justice. The section approves 'the actions of the
> " 'government of the Philippine Islands' 'taken in
> " 'accordance with the provisions of said order and
> " 'subsequent amendments.' He says that 'the approval
> " 'of the action of the authorities is confined to those
> " 'which were in accordance *with the order*, which, as
> " 'we have already intimated, the collection of these
> " 'duties was not.' With deference, the approval is not
> " confined to those actions in accordance with the
> " order, but it is expressly and *ex industria* extended to
> " include those which were taken in accord *with subse-*
> " *quent amendments.*"

The learned Attorney-General next refers at some length to the language of the various orders of April 10, 1899 (p. 17),

May 3, 1899 (p. 18), claimed to be amendments, and continues, at page 19:

> "The statement of facts will have utterly failed in "its purpose if it does not show that by the order of "May 3, 1899, the President intended to amend the "order of July 12, 1898, by treating it in force after the "war and by continuing it with a few amendments, that "he intended thereby to impose duties on goods com- "ing from the United States, and that the collection of "duties accordingly was known to him and approved "by him."

One would gather from this argument that the learned Attorney-General contended that, after April 11th, 1899, the President so amended his order of July 12th, 1898, as to make it in terms applicable to goods from the United States. In other words, that, by so amending, he legislated.

Compare, then, the following statements at pages 13-14 of his brief of October, 1905.

> "We shall endeavor to state the point briefly and "clearly; the President during the war emergencies "directed his officers to act in a certain way, to col- "lect duties under a provisional tariff. If his orders "to that effect before the treaty took effect were, tech- "nically legislation, that was valid legislation beyond "question and needed no ratification from Congress. "These orders fell, let us say, as valid legislation on "April 11, 1899, but *the President continued to do the* "*thing prescribed without immediate authority. He did* "*not legislate; he did not re-establish former legisla-* "*tion;* he simply acted and continued to act."

In other words the latest position of counsel for the Government seems to be that they concede that after April 11th, 1899, the President "did not legislate" that is he did not by any amendment or subsequent order attempt to *impose* duties on imports from the United States; he "simply acted," that is, we apprehend, through his subordinates, *collected* these duties "without (immediate) authority." This is equivalent to an admission that the amendments made after April 11th, 1899 did not change the proper construction of the order and that the subordinates misconstrued the order; exactly our position on this point.

It may be, however, that the Government still relies upon the arguments advanced in the brief of May to the effect that these amendments did change the meaning of the order by making it applicable to imports from the United States.

In our brief in opposition to the petition for rehearing (pages 3–6) we discussed the so called "amendments" or orders of October 10, 1898, December 21st, 1898 and May 3, 1899 and pointed out that the first two, made before the ratification of the treaty of peace, did not purport to change the language of the order by making it apply to imports from the United States after the ratification nor did the order of May 3, 1899 which made the Philippines and Guam a collection district, with Manila the chief port of entry, and provided for the assignment of an army officer as collector. The order of December 21, 1898, by which the President upon the signing of the treaty and in anticipation of its ratification, proclaimed the sovereignty of the United States over the Philippines, expressly provided that all goods should be admitted upon payment of the duties in force at the time of their importation. Far from being an extension of the order of July 12, 1898, so as to include imports from the United States, it amounted to an abrogation of that order as a war measure and an express direction to the authorities of the Government of the Philippines to collect only such duties as might at the time of importation be lawfully in force. The only duties lawfully in force after April 11, 1899, were duties on imports from foreign countries. A further order was made on May 8th, 1899 providing for the appointment of auditors of the various departments of the military government in the Philippines and in October 1899 an order was made by the military governor republishing the order of July 12th, 1898 with all its amendments to date.

This last named order reads as follows :

> " Office of the U. S. Military Governor of the Philippine Islands.
>
> " Manila, P. I. October 23, 1899.
>
> " General Orders No. 49.
>
> " The Customs Tariff and Regulations promulgated " in General orders of 26th of last October from this " office having been amended from time to time since " that date, the following revised printed schedules " of the same which *contain all amendments to September*

" *1st last* is hereby published for the information and " guidance of all concerned.

" Upon the occupation and possession of any ports " or places in the Philippine Islands by the forces of " the United States, not as yet in United States oc- " cupancy, this order will be proclaimed and enforced.

" By command of Major General OTIS,

" THOMAS H. BARRY,
Assistant Adjutant General."

As expressly stated in this order the printed schedules annexed contain all amendments of the original order of July 12, 1898, up to September 1st, 1899, and on referring to these schedules we find not a word which alters the provisions of that order with respect to the subject matter of the duties. There are certain sections added, one numbered " ½ " in relation to the port of Manila having been established as the chief port of the Philippines, others with regard to modifications of administrative details, and there are certain slight changes in the rates of duty. Otherwise, the various sections and schedules in this order of October 23, 1899, are the exact counterpart of the sections and schedules in the order of July 12, 1898.

Clearly this order of October 23, 1899, embodying all the orders promulgated before its issue, did not specifically impose duties on imports from the United States, nor did it impose such duties by implication any more than did the order of July 12th, 1898, which has been held not to impose such duties, either expressly or by implication.

The provisions that merchandise imported, exported or in transit for the use of the Government should be exempt from wharf charges (paragraph 18); that supplies for the use of the Army and Navy should be admitted free (paragraph 22), and that articles purchased with the funds of the United States for its use and materials for public works should be exempt (paragraph 367) were all contained in the schedules annexed to the original order of July 12, 1898, and are all entirely consistent with a right to free entry of goods from the United States; for all these provisions have force and effect, the tariff applying to foreign imports only. Moreover, there are substantially identical provisions in the Amended Customs Tariff and Regulations for Ports in Porto Rico construed by this Court in the first Dooley case.

An equally strong, if not stronger, inference could have been drawn that the Porto Rican order applied to imports from the United States after April 11, 1899, from the fact that the President collected duties on such imports and manifestly intended that the order should so apply.

On May 8th, 1899, nearly a month after the ratification of the treaty and the very day that he issued a similar order with reference to the Philippines the President issued an order "by virtue of the authority vested in me as commander-in-"chief of the Army and Navy," creating in and for the Island of Porto Rico the offices of auditor and assistant auditor for the Customs, and auditor for the Post Office, to be appointed by the Secretary of War, and treasurer of the islands, to be filled by the appointment thereto of an officer of the regular army, and authorizing the Secretary of War to carry into effect the provisions of executive orders.

On May 27th, 1899, the United States Insular Commission, appointed by the President to investigate into the civil affairs of the island, made its report to the Secretary of War, from which we quote as follows:

At page 74:

"*No law has been passed by Congress* making the "island a collection district * * * and no law has "been prepared fixing the duties as between this coun-"try proper and dependencies or outlying possessions, "as doubtless may be done under the wording of the "Constitution. So duties on the goods imported into the "United States are still as though Porto Rico were a "foreign country. *Duties are likewise demanded, though "at different rates, in some instances as before the cession "from Spain, on all goods imported into Porto Rico "from the United States.*

"Since the cession has become complete by ratifica-"tion by the Senate and full recognition has been made "by the proper authority of the United States of the "fact that Porto Rico is a part of our possessions, it "can no longer be regarded as foreign."

"We have no doubt of *the power of the President*, as "Commander-in-Chief, to prescribe the rates of duty "on goods imported from all countries into the island, "*including those coming from this country as well, and "such power has already been exercised*, until Congress "shall assert its power to act and make its own regula-"tions."

"Whether the President can make different rates "on goods from the United States than from other "countries is a different and more perplexing ques- "tion."

"Since the provisions of the reciprocity laws of the "United States provide for a treaty to be made by the "President with the advice and consent of the Senate, "with some foreign power, and since there is, as to "Porto Rico, no one to treat with and no foreign "power, clearly this provision will not apply, other- "wise reciprocal arrangements could be made as to "goods and products of the island not grown and pro- "duced here, and similar goods grown and produced "here and not there, and some could be placed on the "free list and others reduced on approval of Congress."

"It would seem that the relations between the "island and the General Government would emphasize "the need and utility of such reciprocity, and of some "means through which the President would be author- "ized to give relief to the island and some advantage "for marketing our surplus of agricultural products "and manufactured goods, so much needed by the "people of Porto Rico."

"We would, therefore, recommend that Congress be "asked to authorize the President to make such modi- "fications in the tariff schedule between the United "States and Porto Rico as he may deem wise pending "the action of Congress in fixing the full status of the "island province, and regulations of customs duties and "such interchange of commodities as they may estab- "lish by law.

"We would, however, recommend that as to duties "collected on the island some measure of relief be "afforded the people there and trade be encouraged "with the United States.

"We think the articles above named (wheat, flour, "machinery, canned goods, etc.) and many others "*should receive special consideration in the duties to be* "*exacted*, and that the schedules be revised *in advance* "*of any general law by Congress.*"

It thus appears that only six weeks after the ratification of the treaty the administration had before it, presented to it by its own commission, first, the question as to the power of the President to continue to collect duties on imports from the United States into Porto Rico, and second, the fact that such duties were in fact being collected after the ratification of the treaty. Yet the military authorities, without further modification of the President's order, continued to *collect* duties

on imports from the United States. The intention of the executive could not have been clearer than it was with respect to Porto Rico.

These amendments of the Porto Rican order and this report were all before this Court, in the form of judicial notice at least, when it decided the first Dooley case, yet, no suggestion was made that they had any bearing on the construction of the Porto Rican Tariff order with respect to imports from the United States.

Further light upon the proper construction of the order of July 12th, 1898, and its amendments, if any is required, with regard to its applying to goods imported from the United States after April 11th, 1899, is cast by the language of the Tariff Revision Law of the Philippine Commission enacted September 17th, to take effect November 15th, 1901, and of the Act of Congress of March 8th, 1902.

It will be borne in mind that up to the time of the passage of the Revision of 1901, there had been three tariff orders in force in the Philippines. The first issued by the general in command continuing the Spanish tariff in force; the second, the order of July 12th, 1898, put in force November 10th, 1898, made under the proper exercise of the war power of the President during the war with Spain, and applying, during the war, to imports from all foreign countries which term, during the war, included the United States; the third, the order of the military governor of October 23d, 1899, G. O. 49, republishing the order of July 12, 1898, with all amendments to date of September 1st, 1899. While this order was in force this Court, on May 27th, 1901, decided the first Dooley case, holding that the similar Porto Rican order did not apply to imports from the United States after April 11th, 1899. After this decision and while the *Diamond Rings* case was still under advisement, the Philippine Commission on September 17, 1901, passed "An Act to Revise and *Amend* the Tariff Laws of the Philippine Archipelago." This Act by Section I. provided that:

> "The provisions of General Order No. 49 Office of
> "the United States Military Governor—dated October
> "23, 1899, relating to customs duties on imports and
> "exports of the Philippine Islands—and the several
> "orders supplemental thereto and amendatory thereof
> "are hereby *amended* to read as follows:"

"SECTION 2. Duties shall be collected on all articles, "goods and merchandise *imported into the Philippine* "*Islands*, at the rates hereinafter prescribed, except "when expressly exempted from duty by this Act."

SECTION 10. "*Importations from the United States* "*are dutiable* under the provisions of this Act, but no "customs duties shall be imposed on articles, goods "or merchandise transported only from one place or "port to another place or port in the Philippine "Islands."

This enactment of the Philippine Commission was not a mere continuation of the former tariff but an express amendment. It contains in Section 2 language far more specific than that of the order of July 12, 1898, in defining the subject matter on which the tax was imposed namely "on *all articles*, goods and merchandise *imported;*" the order of July, 1898, having merely provided that "upon the occupation and pos- "session of any ports and places in the Philippine Islands— "the following tariff of duties and taxes to be levied as a mili- "tary contribution—shall take effect and be in force." The order of October 23, 1899, did not actually *impose* a tax upon anything but assumed that the tax had been already imposed and stated the rates of duty to be collected and the manner of collection.

Plainly then the learned gentlemen who on September 17th, 1901, were legislating as the Philippine Commission "By the authority of the President of the United "States and with the approval of the Secretary of "War first had" were of the opinion and rightly so, that the words "Duties shall be collected "on all articles imported into the Philippine Islands" would not apply to articles brought (not imported) from the United States, consequently they enacted a special section, nothing similar to which had before been included in any order or amendment, providing in plain and unequivocal language that "Importations from the United States are dutiable under the "provisions of this Act."

This it seems to us is a clear admission that up to that time importations from the United States after April 11, 1899, had not been subject to duty.

Despite this explicit language in the Tariff Act of the Philippine Commission, imposing duties on goods imported from the United States, Congress had such grave doubts as to the power of the Commission to impose such duties that in the first section of the Act of March 8, 1902, 32 Stat. 54, it first provided

> " That the provisions of an Act entitled ' An Act to
> " ' revise and amend the tariff laws of the Philippine
> " ' Archipelago ' enacted by the United States Phil-
> " ippine Commission on the seventeenth day of Septem-
> " ber 1901 shall be and remain in full force and effect."

Had the Philippine Commission, acting at the time under power delegated to it by the president, and having, we may assume for argument, the power of the president, certainly no greater power, by this act, effectually, that is to say with constitutional authority and power so to do [for of the meaning of their language there can be no doubt] imposed duties upon articles imported or brought into the Philippines from the United States, it is entirely clear that the above provisions of the Act of Congress of March 8, 1902, would, under the decision of this Court in the second Dooley case, 183 U. S., 151, have imposed duties upon imports from the United States; but so doubtful was the power of the President, through his appointees the Commission to impose these duties that Congress further enacted in the following clause :

> " *and* there shall be levied, collected and paid upon all
> " articles coming into the Philippine Archipelago from
> " the United States the rates of duty which are required
> " by the said Act to be levied,"

not upon articles imported from the United States as the Act of the Philippine Commission expressly provides, but

> " upon like articles imported from foreign countries
> " into said Archipelago."

In other words, Congress by this act, far from ratifying the previous collection of duties on imports from the United States by the President acting either through the officers of the army or through the Commission, utterly ignores the fact

that the army officers had collected such duties under the official misconstruction of the President's order of July 12, 1898, and that the Commission not only collected, but expressly, in clear and unmistakable language, attempted to impose them. This act is clearly prospective and shows plainly that at the time of its passage Congress had not in mind the ratification of the collection of duties on imports from the United States under the order of July 12, 1898.

Surely the language of this act shows that Congress believed that it alone had the power, as this Court said in the first Dooley case, to impose duties on imports from the United States and that neither did the President have the power to, nor did his orders with their amendments, impose such duties.

(c) These duties were all collected by the authorities of the government of the Philippine Islands under an erroneous construction of this order and its amendments.

The reason that the Secretary of War, in his cable of June 8, 1901 (quoted in full in Attorney General's brief of May, 1905, pp. 8, 9), directed the authorities of the military government to continue to collect these duties after this Court had held in the first Dooley case that the similar Porto Rican order did not apply after April 11th, 1899, to imports from the United States, is obviously that, until this Court should have decided the Diamond Rings case, it was still a doubtful question whether the fact of the insurrection authorized the collection of these duties as a military contribution; in other words, whether, because of that insurrection, the Philippines and the United States were foreign the one to the other. The Executive Department very properly resolved this doubt in favor of the Government, for the Government could not have collected the duties afterwards, once the goods had been admitted free.

The Diamond Rings opinion was not handed down until December 2, 1901, several weeks after the order of July 12, 1898, and its amendments, had been superseded by the Tariff Revision Law of 1901 enacted by the Philippine Commission September 16, 1901, to take effect November 15, 1901.

Of all the orders, amendments and other directions of the executive department, this cable of June 8, 1901, alone specifically directs the collection of duties on imports from the United States; but it is perfectly clear, from the terms

of this cable, that it did not purport to amend or enlarge the scope of the order of July 12th, 1898, in any way, or to impose duties, but was a mere statement of the construction which the Administration placed upon that order until the decision of this Court as to the legal status of the Philippines should be known.

It was an erroneous construction of the meaning and application of the order of July 12th, 1898; but, had the Diamond Rings decision been handed down at the same time with the decision in the first Dooley case, we are confident that so good a lawyer as the then Secretary of War would have seen that, under the two decisions, the meaning of the order was no longer doubtful, and he would have, therefore, directed the free entry of goods from the United States until Congress should constitutionally legislate on the subject.

(*d*) The act, by express language, ratifies only the action of the authorities of the Government of the Philippine Islands taken in accordance with the provisions of said order and its amendments. The collection of duties on imports from the United States after April 11th, 1899, was not in accordance with the provisions of the order and its amendments, and therefore was not ratified.

The second section of the Act of July 1st, 1902, 32 Stat., 691, is the only enactment by Congress now claimed to effect a ratification of the collection of these duties which requires serious consideration. Its language should, however, be read in connection with the language of the Act of March 8th, 1902, which is expressly excepted from amendment or repeal by implication (proviso to second section).

We have already adverted, under subpoint *b* *supra*, to the peculiar language of the Act of March 8th. Far from ratifying the imposition or collection of duties theretofore made by any order of the President or of the Commission, Congress by that act, while recognizing and continuing in effect the Tariff Act of the Commission in so far as it applied to foreign countries, wholly ignored the attempted imposition by the Commission of duties on imports from the United States, and expressly imposed such duties for the future by an independent clause, in addition to the clause continuing in force the tariff enacted by the Commission. It appears, therefore, that Congress,

not merely by a presumption of law, but clearly, from the language used in this Act of March, 8th actually knew the decisions of this Court in the Insular Cases. It knew that the President had not, and that Congress alone had, the power to impose these duties. Congress even went so far as to distinguish with technical nicety, having in view the decision of this Court in the second Dooley case, between articles "coming "into the Philippines from the United States," and "articles "imported' from foreign countries;" a verbal distinction which the learned Commission had not borne in mind.

The language of the Act of July 1st, 1902, shows even more plainly that Congress had in mind the decisions of this Court in the Insular cases and that what it meant to do was to ratify and approve the actions of the President in the Philippines similar to his actions in Porto Rico which this Court had decided to have been within his constitutional power.

The Act of July 1st, 1902, second section, reads:

> "SEC. 2. That the action of the President of the "United States *heretofore taken by virtue of the au-* "*thority vested in him as Commander in Chief* of the "Army and Navy *as set forth in his order* of July 12th, "1898, whereby a tariff of duties and taxes *as set forth* "*by said order* was to be levied and collected at all "ports and places in the Philippine Islands, upon "passing into the occupation and possession of the "forces of the United States, together with the subse- "quent amendments of said order, are hereby approved, "ratified and confirmed, and the actions of the au- "thorities of the government of the Philippine "Islands, *taken in accordance with the provisions of* "*said order and subsequent amendments*, are hereby "approved, *Provided*, that nothing contained in this "section shall be held to amend or repeal an Act en- "titled 'An Act temporarily to provide revenue for the "Philippine Islands and for other purposes."

In construing this act the first endeavor of the Court must be to ascertain the intent of Congress; this intent is to be ascertained from the language of the act, giving due effect to each and every word, not by first determining the intent of the President and then saying that inferentially the intent of Congress must have been the same, nor by stating what the administration wanted or what secret meaning the draftsman

of the act had in mind which he did not venture to express in plain, unequivocal and concise language.

When the meaning of an act is plainly apparent and that meaning gives effect to the act and at the same time works substantial justice and brings the act clearly within the constitutional power of Congress, that meaning is to be adopted in preference to one which would make the constitutional validity of the act very doubtful, would impose a retroactive tax under the guise of ratification and deprive citizens of rights to which this Court had, before the passage of the act, held that they were entitled.

The words upon which this part of the controversy hinges are

> " the actions of the authorities of the Government of
> " the Philippine Islands *taken in accordance with the*
> " *provisions of said order and subsequent amendments*
> " are hereby approved."

This is necessarily equivalent to saying that the actions not taken in accordance with the provisions of the order are not approved.

The first question, then, is what actions taken by the authorities of the Government were in accordance with the provisions of the order of July 12th, 1898, and its amendments? Plainly, the collection of such duties as the order and its amendments under their proper construction authorized. As we have seen, the order and its amendments authorized the collection of duties on imports from foreign countries, including imports from the United States until April 11th, 1899. As we have also seen, the order did not, nor did any of its amendments apply to, imports from the United States after April 11th, 1899, nor had the President power to make an order imposing duties on imports from the United States after that date. Therefore, the actions of the authorities in collecting duties on imports from the United States after April 11th, 1899, were not in accordance with the provisions of the order and hence were not ratified, and so this Court has expressly held in this case, 197 U. S., page 429, where it says:

> " Without considering how far the first part of the
> " section extends, the approval of the action of the au-

> " thorities is confined to those which were in accordance
> " with the provisions of the order, which, as we already
> " have intimated, the collection of these duties was
> " not."

Obviously, in rendering its decision upon this point, the Court had in mind the amendments as well as the order, all of which were before it on the main argument.

The amendment made by the order of December 21st, 1898 (Petition for Rehearing, p. 5), expressly provided that—

> " all goods and wares not prohibited for military rea-
> " sons by due announcement of the military authorities
> " will be admitted upon payment of such duties and
> " other charges *as shall be in force at the time of their*
> " *importation.*"

As we have seen above (pp. 20–23), no other of the so-called amendments altered the meaning of the order of July 12, 1898, and the only duties in force at the time of the importation of the claimants' goods were those prescribed by that order, or by the general tariff laws of the United States, both of which applied only to imports from foreign countries. This amendment, therefore, amounted to an express direction from the President to his subordinates not to collect any duties except such as were authorized by that order, or by the statute which might be in force at the time of the importation. In collecting duties on imports from the United States after April 11th, 1899, the subordinates were not acting in accordance with the provisions of this amendment and therefore such collection is not ratified.

2. *The action of the President taken by virtue of the authority vested in him as commander-in-chief as set forth in his order of July 12th, 1898, which the act purports to ratify, does not include the collection of these duties.*

(*a*) It is the law of this case that the authority vested in the President as commander-in-chief did not extend so far as to empower him to impose or collect duties on imports from the United States into Manila after the ratification of the treaty.

First, as to the imposition of these duties by the President. It is finally and conclusively settled by the opinions of

this Court in the first Dooley case and in this case that the President had not the power to impose these duties after the ratification of the treaty. At page 429 in a passage which we have already quoted at page 7, *supra*, this Court says:

> " The fact that there was an insurrection of natives
> " not recognized as belligerents in another part of the
> " island, or even just outside its (Manila's) walls did
> " not give the President power to impose duties on im-
> " ports from a country no longer foreign. See *Dooley*
> " *v. United States*, 182 U. S., 222, 234."

In the Dooley case at page 234 this Court said:

> " We have no doubt, however, that from the neces-
> " sities of the case, the right to administer the govern-
> " ment of Porto Rico continued in the military com-
> " mander after the ratification of the treaty, and until
> " further action by Congress. *Cross v. Harrison*, above
> " cited. At the same time while the right to administer
> " the government continued, the conclusion of the
> " treaty of peace and the cession of the island to the
> " United States were not without their significance.
> " By that act Porto Rico ceased to be a foreign country,
> " and the right to collect duties upon imports from that
> " island ceased. We think the correlative right to ex-
> " act duties upon importations from New York to Porto
> " Rico also ceased."

Why? Because, as the learned Justice points out,

> " *The spirit as well as the letter of the tariff laws*
> " admit of duties being levied by a military commander
> " *only upon importations from foreign countries;* and
> " while his power is necessarily despotic, this must be
> " understood *rather in an administrative than a legisla-*
> " *tive sense.* While in legislating for a conquered
> " country he may disregard the laws of that country,
> " he is not wholly above the laws of his own."

And at page 236 the Court says further:

> " In our opinion *the authority of the President as*
> " *Commander-in-Chief* to exact duties upon imports from
> " the United States *ceased* with the ratification of the
> " treaty of peace."

This last quotation from the opinion in the Dooley case defines precisely the limitation of the President's authority on this subject as commander-in-chief, and, read in connection with the opinion in this case and the other quotation from the Dooley case, establishes the doctrine that in Manila the President had power as commander-in-chief to collect duties on imports from all foreign countries both during the war and after the ratification; during the war as a military measure incidental to his power to wage war; after the ratification of the treaty as the executive of the tariff laws of the United States, but that he had no power *after the ratification of the treaty* to impose duties on imports from New York into Manila because the United States was no longer foreign, and Congress had not, except in the case of the Foraker Act, which related only to Porto Rico, passed any act imposing duties on goods brought from the United States to the ceded insular territories. As soon as the port of Manila became domestic his power of legislation was strictly limited to providing for such details of administration as the necessities of the case demanded, and he had no power to levy duties on imports from the United States.

(*b*) It follows that the imposition and collection of these duties is not within the terms of the act inasmuch as it ratifies only "the action of the President taken by virtue of the authority vested in him as commander-in-chief as set forth in his order."

The learned Attorney-General asks the Court to construe this act as if the words "by virtue of the authority vested in him as commander-in-chief as set forth in his order," etc., had been omitted. As if, omitting these words, the act read:

> "That the action of the President—heretofore taken
> "—whereby—a tariff of duties and taxes—was collected
> "at all ports and places in the Philippine Islands upon
> "passing into the occupation and possession of the
> "forces of the United States—(is) hereby approved,
> "ratified and confirmed, and the actions of the authori-
> "ties of the government of the Philippine Islands—(in
> "collecting such duties) are hereby approved."

If this is what Congress meant to say why did it not say so in some such short, concise and unequivocal language? Its

meaning would then have been plain and this Court would have been obliged to hold that Congress intended to ratify the illegal and unwarranted seizure and confiscation of the property and money of the claimants and others similarly situated. This construction cannot be given to the act without wholly disregarding the words which we have omitted and treating them as meaningless, in violation of the general principle of statutory construction that, where possible, effect shall be given to every word in the statute. From the language which Congress actually used it is entirely clear that it intended to ratify only such action of the President as he had the constitutional power to perform, as commander-in-chief of the army and navy, and that action only as set forth in the order of July 12th. That order by its proper construction did not apply to imports from the United States after April 11th, 1899. Neither by that order nor by any of its amendments did the President attempt to impose duties on such imports. In fact the collection of the duties was not the act of the President; his act was making the original order and certain of the amendments. The collection of the duties was the act of his subordinates arising out of a misapprehension of the proper construction of the order. The order and amendments did not impose duties on these imports and Congress by ratifying the action of the President as set forth in his order did not ratify acts which the order and amendments did not authorize namely, the collection of the duties involved in these suits.

II. CONGRESS CANNOT HAVE INTENDED TO RATIFY THE COLLECTION OF THE DUTIES INVOLVED IN THESE CASES.

1. *The Court will not impute to Congress the intention to deprive citizens of rights to which this Court had at the time of the passage of the act held that other citizens under like circumstances were entitled.*

The law is now conclusively settled that from April 11th, 1899, until at least November 15th, 1901, the date when the tariff enacted by the Philippine Commission took effect, the claimants and all other merchants had the right to bring their goods duty free into Manila from the United States. This rule of law is based entirely upon and is really deduced as a corollary from the decisions in the first Dooley case and the

case of the Fourteen Diamond Rings decided May 27th, 1901, and December 2d, 1901, respectively.

The alleged act of ratification was passed July 1st, 1902, when these cases were pending; the petition in the Lincoln case having been filed March 29th and in the Warner Barnes case January 18th, 1902. These dates are significant in view of the carefully-guarded language used by Congress. It is clear to us that Congress with full knowledge and appreciation of the decisions of this Court, holding that in Porto Rico the authority vested in the President as commander-in-chief did not include the imposition and collection of duties on goods imported after April 11th, 1899, and before legislation by Congress on the subject, from the United States into Porto Rico, that is from a country no longer foreign, and that the collection of duties during that period in Porto Rico, was not in accordance with the provisions of his order, and that the Philippines, like Porto Rico, were no longer foreign to the United States, and with full knowledge also of the pendency of these actions, involving the extent of the authority vested in the President as commander-in-chief and the question as to whether the collection of these duties was in accordance with the President's order of July 12th, 1898, and its amendments, used the words:

> "action taken by the President *by virtue of the au-*
> "*thority vested in him as commander-in-chief as set*
> "*forth in his order* of July 12th, 1898, whereby a tariff
> "of duties *as set forth by said order.*"

and the words:

> "the action of the authorities of the Government of the
> "Philippine Islands *taken in accordance with the pro-*
> "*visions* of said order and subsequent amendments."

with the intention that full force should be given to their natural meaning and in order to indicate beyond all question that its intention was that only such action of the President as this Court had decided, or might thereafter decide, that he had the power to take and only such actions of the subordinates as were within the terms of the order, were ratified. Had Congress intended to ratify that which this Court had

held, or might thereafter hold, to be illegal and done without authority or warrant of law, it would have said so in unmistakable terms. Not only does the language used plainly express the meaning we have stated, but if the meaning were doubtful every intendment would be against the construction urged in behalf of the Government.

2. *The ratification of the collection of these duties would be entirely inconsistent with the general policy of the legislation by Congress since the decisions in the first insular cases, refunding all the duties, which as this Court decided had been illegally exacted.*

These acts are worthy of more than a brief mention. This Court decided in the first Dooley case, in which claimants were American citizens, that judgment could be recovered against the United States in a suit under the Tucker Act for the recovery of duties illegally exacted in Porto Rico. The great majority of the other claimants who held claims similar to that of Dooley, Smith & Co., thereupon applied to the Secretary of the Treasury for the payment of their claims. The Comptroller of the Treasury to whom the matter was referred decided that there was no available appropriation. The claimants had then no recourse but to sue the military collectors or the Government. The collectors could not be found. There was serious doubt, as to whether native Porto Ricans unless they were American citizens which has not even yet been decided, or aliens, subjects of a power according like privileges to American citizens, which they were before the war, but clearly were not after the treaty, could sue the United States under existing law in the Court of Claims. Congress, therefore, in order to set all questions of jurisdiction at rest and to give the native Porto Rican merchants the same measure of relief to which they would have been entitled had they, like the importers *from* Porto Rico, been in a position to recover judgments against the collectors for the amount of the duties, with interest, on April 29th, 1902, passed a special act (Chap. 640, 31 Stat., 176), "to refund the amount of duties "paid in Porto Rico upon articles imported from the several "States, from April 11th, 1899, to May 1st, 1900, to confer jurisdiction on the Court of Claims to render judgment thereon and making an appropriation therefor." By this act jurisdiction was conferred on the Court of Claims of all claims

against the United States for customs duties paid to the military authorities in Porto Rico upon articles imported from the several States and entered from April 11th, 1899, to May 1st, 1900, and that Court was "empowered *and directed* to ascertain the amounts of such duties paid during said period and to enter judgment against the United States for the several amounts so paid *with interest thereon* at the rate of six per centum per annum from the several dates of payment of such duties to the dates of such judgments, respectively, in all actions for the recovery of such duties now pending in the Court of Claims and in all actions for the recovery of such duties which may be brought in said Court within six months from the date of the passage of this Act." Under section 2, the Secretary of the Treasury was authorized to pay the judgments on certification.

This act amounted to a waiver of all technical defenses which might have existed and in directing the allowance of interest abrogated *pro tanto* the general rule expressed in Section 1091 of the Revised Statutes that the recovery of interest against the United States is not allowed unless expressly stipulated to be paid under the terms of a contract.

Under this Act of April 29th, 1902, judgments for over half a million dollars were recovered in the Court of Claims. Meantime following the decisions in *De Lima vs. Bidwell* and the *Diamond Rings* judgments were entered against the collectors of customs for duties paid on imports from Porto Rico and the Philippines, with interest, amounting to fully two million dollars. In certain cases of this series, however, the government succeeded in defeating the plaintiffs by the plea of no protest(*Dewell vs. Mix*, 116 Fed., 664, *Flint Eddy vs. Bidwell*, 123 Fed., 200 While this defense was technically good and would have been equally good in the Court of Claims (*Chesebrough vs. United States*, 192 U. S., 253), the fact remained that there was money in the Treasury which justly and equitably belonged to the importers. Congress therefore to do equal justice to all similarly situated passed on March 3d, 1903, "An Act to refund the amount of duties paid on merchandise brought into the United States from Porto Rico between April 11, 1899, and May 1, 1900, and *also on merchandise brought into the United States from the Philippine Islands* between April 11th, 1899, and March 8, 1902, and for other purposes" (Chap. 1016, 31

Stat., 1224). This act authorized the Secretary of the Treasury to refund and repay from the appropriation "To repay to importers the excess of deposits for unascertained duties or duties or other moneys paid *under protest*," made by Section 3689, Rev. Stat., moneys paid to the United States *without protest* as duties and as fines on merchandise brought into the United States from Porto Rico *and the Philippines* during the periods stated in the title. This Act was drawn by the Secretary of the Treasury and recommended by him to the favorable consideration of Congress.

The next of this series of enactments is that of March 3d, 1905, Chap. 1447, 33 Stat. 1013, by which Congress extended for a further period of six months from March 3d, 1905, the time within which suits for the recovery of customs duties paid to the military authorities in Porto Rico might be brought under the Act of April 29, 1902, above referred to. The reason for the passage of this last Act was that several Porto Rican merchants through inadvertence or mistake had failed to file their claims within the six months allowed by the Act of 1902. The Court of Claims had however, meantime, in the case of *Basso vs. United States*, 36 Ct. Cl., decided that native Porto Ricans could sue in that Court, so that the principal result of the Act was to allow the Porto Rican merchants to recover interest on their claims for a period of about six years and with respect to certain items of the claims to enlarge the time allowed by the general Statute of Limitations for filing petitions for their recovery.

It is inconceivable that the same Congress which treated the other decisions of this Court in the Insular cases with such respect as not only to refund the moneys which could have been recovered under existing law but to pass special laws for refunding moneys which, while justly and equitably belonging to plaintiffs, the Courts had held that they could not recover by action at law, and to put the native Porto Rican importers on a plane of equal rights with the American importers by allowing the former to recover interest, should single out the merchants who had paid duties in the Philippines, and while actions were pending to test their rights, confiscate these moneys which, as this Court has decided, belong to them.

Such an act of legislation is unheard of, and no act of

Congress will be construed to effectuate such a result on a mere implication, or on account of what the executive authorities may now think Congress must or should have intended.

3. It is always presumed that Congress does not intend to violate any of the provisions of the Constitution, or to repudiate the obligations of the government.

Were the construction of this act doubtful, as it is not, the Court would not adopt a construction, even though in accordance with the natural meaning of the language used, which would effectuate injustice and result in the repudiation of an obligation of the government to pay a just debt.

Knowlton vs. Moore, 178 U. S., 41, 77.

In *Meigs vs. M'Clung's Lessee*, 9 Cr., 11, at 18, Chief-Justice MARSHALL says:

> "The facts that the agents of the United States "took possession of this land, * * * erected ex- "pensive buildings thereon, and placed a garrison there, "cannot be admitted to give an explanation to the "treaty, which would contradict its plain words "and obvious meaning. The land is certainly the "property of the plaintiff below; and *the United States* "*cannot have intended to deprive* him of it by violence "and without compensation."

In *Gibbons vs. United States*, 8 Wall., 269, at 274, this Court says:

> "The supposition that the Government will not pay "its debts or will not do justice is not to be indulged."

In *United States vs. Klein*, 13 Wall., 128, at 144, this Court says:

> "It is as much the duty of the government as of "individuals to fulfil its obligations."

THIRD.

WHAT THE ACT OF JULY 1ST, 1902, WAS INTENDED TO RATIFY IS THE ACTION TAKEN BY THE PRESIDENT IN LEVYING AND COLLECTING DUTIES BY VIRTUE OF HIS AUTHORITY AS COMMANDER-IN-CHIEF, AND THE ACTIONS OF THE AUTHORITIES OF THE GOVERNMENT OF THE PHILIPPINE ISLANDS TAKEN IN ACCORDANCE WITH THE PROVISIONS OF THE ORDER OF JULY 12TH, 1898, AND ITS AMENDMENTS, NAMELY, THE IMPOSITION AND COLLECTION OF DUTIES UPON IMPORTS FROM FOREIGN COUNTRIES INTO THE PHILIPPINES FROM THE TIME THE ORDER TOOK EFFECT NOVEMBER 10TH, 1898, TO NOVEMBER 15TH, 1901, INCLUDING IMPORTS FROM THE UNITED STATES UNTIL APRIL 11TH, 1899.

I. *The legality of the collection of duties upon imports from foreign countries by order of the President prior to legislation by Congress, in either the Philippines or Porto Rico, has never been decided by this Court, and was, therefore, a question of some doubt.*

(a) While the order of July 12th, 1898, and its amendments provided for the collection of duties upon imports from foreign countries, the legality of their collection under a war tariff after the ratification of a treaty of peace, had never been passed upon by this Court.

It is unquestionably the law of this case that this order and its amendments *imposed* duties upon imports from foreign countries. The first Dooley case holds squarely that *prior to the ratification* of the treaty the President had power to impose and collect duties on imports from the United States, because until that time the United States and Porto Rico were foreign the one to the other. That case, however, involved only duties on articles imported from the United States. The opinion did not question, but neither did it affirm, the power of the President after the ratification of the treaty to collect duties upon imports into Porto Rico from foreign countries at the rates prescribed in his military order issued before the ratification of the treaty which rates differed entirely from those prescribed in the tariff laws of the United States. On the other hand, in *Cross vs. Harrison* (16 How., 164), this Court held that as soon as the ratification of the treaty with Mexico

was known to the military governor of California, he had the right and power, acting under the instructions from the President, to put in force the tariff laws of the United States with respect to all importations into California from foreign countries, and that until officially informed of the ratification of the treaty, he was justified in continuing the war tariff in force with respect to foreign importations (16 How., 189).

In this case this Court has said with reference to the construction of the order of July 12th, 1898:

> "The natural view would be that the order expired
> "by its own terms when the war with Spain was at an
> "end. * * * It was a regulation for and during an
> "existing war, referred to as definitely as if it had been
> "named. See Dooley v. United States, 182 U. S., 222,
> "234, 235."

So far as our researches, and those of other counsel who argued the various Insular cases, go, there is no decision of this Court other than *Dooley vs. United States*, No. 1, and *Cross vs. Harrison*, which has any bearing on the legality of the continued collection of duties on imports from foreign countries by the military authorities in a conquered, ceded territory after the ratification of a treaty of cession, under a tariff established by the President during the war as a military measure, and on this point there is an apparent inconsistency between those two cases; the former intimating that such collection is rightful, the other holding (p. 197) that

> "By the ratifications of the treaty, California be-
> "came a part of the United States. And as there is
> "nothing differently stipulated in the treaty with re-
> "spect to commerce, it became instantly bound and
> "privileged by the laws which Congress had passed to
> "raise a revenue from duties on imports and tonnage."

While in *Cross vs. Harrison* the collection of duties in California on foreign imports for a few months after the treaty, under the war tariff, was sustained, this was expressly upon the ground that the ratification of the treaty was not known to the military governor at the time. As soon as he did know of it he put the tariff laws of the United States in force (see 16 How., 191, 192; *Dooley vs. United States*, 182 U. S., 232).

There is therefore no authority directly in point as to the

legality of the collection of duties in the Philippines on foreign imports after the ratification of the treaty, under the provisions of the order of July 12th, 1898, and its amendments.

(*b*) The order of July 12, 1898, imposed duties on certain articles which under the tariff laws of the United States were on the free list and with respect to which there might well be some doubt as to the power of the President.

By referring to Senate Document 134, 57th Congress, first session "certain memoranda relating to the tariff between the United States and the Philippine Islands" Exhibit C "Comparison of new tariff with the proposed tariff, the old tariff and the United States tariff" we find on pages 34 and 43 a number of articles free under the Dingley Tariff and subject to duty under the order of July 12, 1898, and its amendments.

While as a whole the duties prescribed by this war tariff were much lower than those prescribed by the Tariff Laws of the United States (Senate Doc. 134, *supra*, p. 10), an examination of this comparative table would doubtless show a few individual instances where they were higher, but enough has been said to prove our point that upon certain articles imported from foreign countries the President, after the ratification of the treaty, collected duties without the authority of any act of Congress.

As to the legality of such collections there is certainly doubt, but the action of the military authorities in collecting such duties was doubtless "taken in accordance with the provisions of the order and amendments" and therefore within the terms of the ratification.

(*c*) The amount of duties collected in the Philippines on imports from foreign countries was enormous, and many times greater than the amount collected on imports from the United States.

Exhibit "E," page 89 of Senate Document 134, *supra*, shows that for the fiscal year 1900 the *total value of all goods* imported from the United States was but $1,657,701; in 1901, $2,855,685, while from all other countries the values were $20,601,436 and $30,279,406. The amounts of duties collected were doubtless in about the same proportion.

II. *Congress in ratifying the action taken by the President as to the legality of which there might be doubt, but which was*

probably within the scope of his constitutional power followed its own precedents of a hundred years, but did not embark on a new course of legislation by attempting to ratify action beyond the scope of the President's power as judicially defined.

We need only refer to *Hamilton vs. Dillin*, 21 Wall., 73; *Prize Cases*, 2 Black, 635; *Cross vs. Harrison*, 16 How., 164, for instances of Congress having, out of abundant caution, ratified actions of the President held by this Court to have been within his power.

This very Act of July 1st, 1902, contains, in Section 1, a ratification and approval of "the action of the President in creating the Philippine Commission and authorizing it to exercise the powers of government to the extent and in the manner, etc., set forth in his instructions of April 7, 1900, and in creating the offices of governor and vice-governor, and authorizing them to exercise the powers of government to the extent, etc., set fort. in the executive order dated June 21, 1901, and in establishing four executive departments of government in said Islands as set forth in the Act of the Philippine Commission—enacted September 6, 1901."

With reference to the powers of the Philippine Commission to make laws for the government of the islands this Court, without referring to this ratification, says, in *Dorr vs. United States*, 195 U. S., 138, 153:

> "The act was one of the laws of the Philippine
> "Commission, passed by that body by virtue of the
> "authority given the President under the so-called
> "Spooner resolution of March 2, 1901. The right of
> "Congress to authorize a temporary government of this
> "character is not open to question at this day. The
> "power has been frequently exercised and is too well
> "settled to require further discussion. *De Lima v.*
> "*Bidwell*, 182 U. S., 1, 196."

While the collection of duties upon imports from foreign countries into the Philippines after the ratification of the treaty at different rates from those prescribed by the Tariff Laws of the United States was, as we have said, probably within the authority vested in the President as commander-in-chief, yet this question was by no means free from doubt. It might have been said, in spite of the intimations in the first Dooley case, that under the decision in *Cross vs. Harrison* it

was the "plain duty" of the President in faithfully executing the Laws of the United States to collect duties in the Philippines immediately upon the ratification of the treaty at the rates prescribed in the Tariff Laws of the United States. His failure to do so might well have been the ground of congressional inquiry at some time in the future had there been a change in the results of the elections. Far, therefore, from being an idle thing for Congress to do, to ratify actions within the scope of the President's authority, it was under the circumstances, most natural for the new Congress elected while the President was governing the Philippines without special legislation by Congress to place upon record its approval of and confidence in the actions of the President taken by virtue of the authority vested in him as commander-in-chief by the Constitution.

FOURTH. THE COURT SHOULD ADHERE TO THE OPINION IN THESE CASES ALREADY ANNOUNCED AND MADE A PART OF ITS JUDICIAL RECORDS.

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